

[Advisory Opinion 1994-7]

July 12, 1994

Confidential

[Name1 withheld]

RE: Request for Advisory Opinion and Waiver

Dear [Name1 withheld]:

You have requested an advisory opinion and waiver from the Ethics Commission regarding whether you may represent a client before the Commission on Common Ownership Communities (COCOC), of which you are a member.

The background information you have provided reflects that you are a member of the COCOC, and you are a private attorney with a practice that includes representation of homeowners associations (HOAs) as clients. One of the HOAs has requested that you represent it in a matter that may result in a hearing before the COCOC. You have indicated that you would not be on the panel that would hear the case and that you would recuse yourself from any consideration of the case by the whole Commission. At the Ethics Commission's meeting on June 7, 1994, you appeared and explained that the situation described herein is infrequent, having occurred only once in four years. You also noted that the entire Commission reviews questions involving COCOC's jurisdiction.

Based upon the facts presented and the discussion of the applicable law that follows, the Ethics Commission has denied your request for a waiver to handle your client's case before the COCOC.

Applicable Provisions of the Montgomery County Code

The COCOC is an administrative agency of the Montgomery County Government that is established by statute and codified in the Montgomery County Code 1984, as amended. The COCOC consists of 15 voting members, six of whom are members of professions associated with common ownership communities, such as attorneys who represent associations. §10B-3(a)(3) of the Montgomery County Code 1984, as amended. Among the duties of the COCOC is the ability to hear disputes between or among parties. §10B-9(a) of the Montgomery County Code. If a hearing is held, the panel consists of two COCOC members and one volunteer arbitrator, who serves as chair of the panel; if a suitable arbitrator is not available, the third panel member is selected from the COCOC. §10B-12 of the Montgomery County Code.

The Ethics Law provides in pertinent part:

[U]nless the Commission grants a waiver under subsection 19A-8(b), a public employee must not:

- (1) be employed by any business that:
 - (A) is regulated by the County agency with which the public employee is affiliated; or
 - (B) negotiates or contracts with the County agency with which the public employee is affiliated; or
- (2) hold any employment relationship that would impair the impartiality and independence of judgment of the public employee.

§19A-12(b) of the Montgomery County Code. The waiver provision to which this section refers states:

[A]fter receiving a written request, the Commission may grant a waiver of the prohibitions of subsection 19A-12(b) or Section 19A-13 if it finds:

- (1) the waiver is needed to ensure that competent services to the County are timely and available;
- (2) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; or
- (3) the proposed employment is not likely to create an actual conflict of interest.

§19A-8(b) of the Montgomery County Code.

Analysis

Based upon the Ethics Commission's review of the information you have provided in conjunction with the applicable law, the Ethics Commission must deny your request for a waiver, because the required elements of §19A-8(b) of the Montgomery County Code have not been shown.

The Ethics Commission finds that the grant of a waiver is not necessary to ensure that timely and competent services are provided to the County, because this situation has presented itself only once in a four-year period. Similarly, the denial of the waiver request does not interfere with the County's ability to obtain and retain qualified employees, because this is not a frequent occurrence.

Finally, the Ethics Commission finds that an actual conflict may occur as a result of the proposed employment/representation of your client before the COCOC. Although you have indicated your willingness to recuse yourself from any proceedings before the COCOC that involve your client, this would not remove the actual conflict that would occur in the event that the decision of the COCOC were appealed to the Circuit Court. Upon appeal, if you were to continue your representation, you would be taking a position adverse to the COCOC and the County, which creates an actual conflict of interest.

The decision to deny your request for a waiver, however, does not preclude you from advising your client and assisting with a settlement of the dispute. Rather, the Ethics Commission has denied your request for a waiver to permit you to appear before the COCOC when it conducts a hearing concerning your client.

If you have any questions, please do not hesitate to contact the Ethics Commission.

Sincerely,

Jay L. Cohen, Chair
Montgomery County Ethics Commission

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